In the Supreme Court of the United States

October Term, 1952.

No. ——.

JEWELL FRIZZELL, *Petitioner,*

vs.

WABASH RAILROAD COMPANY, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Jewell Frizzell, petitioner herein, prays that a writ of certiorari issue to review the judgment entered in this case on October 15, 1952, by the United States Court of Appeals for the Eighth Circuit (Tr. 13-14).

Opinion Below.

The opinion of the Court of Appeals (Tr. 4-13) is reported at 199 F. 2nd 153. (Advance Sheet dated December 1, 1952.) The proceedings in the District Court were not officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A., Sec. 1254 (1). The judg-

ment of the Court of Appeals was entered October 15, 1952 (Tr. 13-14). Your petitioner's remedies within the Court of Appeals were exhausted when his petition for rehearing (Tr. 15-26) was denied on November 5, 1952 (Tr. 27).

The jurisdiction of the District Court was founded upon an action arising under the laws of the United States (Title 45, U. S. C. A., Sec. 51, *et seq.*) under Title 28, U. S. C. A., Sec. 1331. The jurisdiction of the Court of Appeals was invoked under Title 28, U. S. C. A., Sec. 1291.

Questions Presented.

1. Whether all of the facts and circumstances of petitioner's case made a prima facie showing of negligence under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), requiring submission of the question of respondent's negligence to the jury?

2. Whether the decision of the Court of Appeals erroneously invoked the defenses of contributory negligence and assumption of risk, depriving petitioner of his immunity from said defenses as provided by Sections 3 and 4 of the Federal Employers' Liability Act (45 U. S. C. A., Secs. 53 and 54)?

STATEMENT.

This action arose upon a complaint filed by petitioner in the United States District Court for the Western District of Missouri, charging respondent with negligence in failing to keep its track, right-of-way and roadbed in a reasonably safe condition for petitioner to work on; maintaining a defective and insufficient setoff; failing to furnish petitioner with sufficient men to perform the work in question; and with failure to furnish petitioner with reasonably safe means or instrumentalities with which to remove work cars from the track and with which to place them back on the track (R. 2). Respondent in its amended answer generally denied the allegations of the complaint and affirmatively set out the defense of contributory negligence (R. 3, 4).

The case was tried before a jury in the District Court. At the conclusion of petitioner's evidence the Court sustained respondent's motion for directed verdict, and directed the jury to return a verdict for the respondent (R. 49, 50).

The petitioner, Jewell Frizzell, was 45 years of age at the time of trial and had worked more than 25 years for the Wabash Railroad Co. as a section hand and section foreman (R. 31). Mr. Frizzell was injured on April 12, 1949, while lifting (R. 34, 35) a work car or push car (R. 8, Plaintiff's Exhibit 2) at the second setoff on respondent's track west of Milepost 364, which is west of Shenandoah, Iowa (R. 32-35; R. 7-29, Plaintiff's Exhibits 1, 3, 4, 5, 6, 7, 8).

The track at the point of the setoff is straight, runs in a general southeast to northwest direction (R. 7, Plaintiff's Exhibit 1) and is built upon a fill with steep banks down from the track all along the track in the vicinity of the setoff (R. 10, 11).

The steepness of the fill or banks in either direction up and down the track from the setoff is approximately the same for 15 to 20 feet on either side of the track (R. 11). The slope of these banks was about 28 per cent (R. 7, Plaintiff's Exhibit 1).

Mr. Frizzell and his section crew were engaged in replacing old ties with new ties on appellee's track on the day of appellant's injury (R. 32) and had been so engaged for about three weeks prior thereto (R. 41). In the work of putting in new ties heavy jacks and other tools are used (R. 32). The crew was using a motor car and a work car or push car (R. 8, Plaintiff's Exhibit 2) on the day in question (R. 32). Heavy section work required the use of both a motor car and a push car about 30% to 40% of the time in the course of a year (R. 39). A motor car or push car weighs 500 to 700 pounds, more than half as much as a motor car (R. 39, 42), and is approximately five feet wide and seven feet long (R. 8, Plaintiff's Exhibit 2).

Mr. Frizzell had been instructed by the track supervisor, his immediate superior (Rules 139, 150, R. 39, 40), to get in all the ties he could before warm weather, and was assigned a quota of 12 ties per day per man (R. 40, 41). The track supervisor gave Frizzell orders about what to be done, checked the number of men in his section crew, and left notes or directives in writing for him at the depot (R. 41, 40).

Motor cars and work cars were most apt to be placed off the track at setoffs along the right-of-way (R. 39, 41), and the crew removed both cars at the same setoff part of the time (Sup. R. 9). The push car would be put off the track at a setoff or a place where it was built up and could be run off easy (R. 42). In laying ties Mr. Frizzell and the crew would put the motor car off the

track at a setoff, put their tools on the push car and push it gradually along the track as the ties were laid (R. 42). Unless a train came by the push car would not have to be put off the track except while the crew was eating lunch (R. 42). Mr. Frizzell made the decision as to where the cars were to be placed off the track (R. 42). The crew customarily and ordinarily ate lunch at a setoff, particularly where there was no level place close by at which to set the car off the track (R. 34).

Setoffs were often constructed out of old ties. In constructing a setoff the ground is built up level, ties are laid parallel with the track and a runoff constructed. A two-car setoff can be made by constructing a single-car setoff on each side of the track (R. 39). The setoff in question was built up between the rails with ballast and ties, in addition to the runoff on the south side of the track (R. 7-29; Plaintiff's Exhibits 1, 3, 4, 5, 6, 7, 8).

Respondent's Rule 306 required all track cars to be removed from the track when not in use, and a clearance of 7 feet between track cars and the nearest rail when they were removed from the track and that they be so located that the track would not be fouled (R. 32-33). Track cars include both motor cars and push cars (R. 33).

It was petitioner's duty to see that the track in his section was in repair for the safe passage of trains. He patrolled his section once each day for that purpose (R. 41). He was also responsible for the work and conduct of the members of his section crew, and was required to remain with them constantly while on duty, and to engage in the work of the section gang where the size of the gang permitted (Rule 179, R. 39, 40). Mr. Frizzell had never been told not to work with and make a hand with his men (R. 40).

Some days no trains would go through petitioner's section during the working hours of the section crew, and the

push car would not have to be removed from the track except while they were eating lunch (R. 42).

Petitioner relieved a Mr. White as section foreman at Shenandoah (R. 32) on March 16, 1949 (R. 41), because of Mr. White's illness (R. 15). The track supervisor had marked the ties to be replaced in the section in the fall, and in the spring the section crew replaces the ties that have been marked (R. 41) with new ties, plates and spikes which have been placed along the track (R. 32). At that time Mr. Frizzell was under orders to put in ties and would not be permitted to do anything else, such as building setoffs, without orders from his supervisor (R. 40). He was to start at one end of his section and work right straight through laying ties (R. 41).

The setoff at which petitioner was injured consisted of a built-up place between the rails, and ties laid parallel to the rails. A runoff some 14 feet long had been built on the south side of the track at right angle to the track, on which to place a car removed from the track (R. 5, 7-29; Plaintiff's Exhibits 1, 3, 4, 5, 6, 7, 8).

On April 12, 1949, Mr. Frizzell was working with a crew of three men putting in new ties. The crew was working away from Shenandoah towards the northwest (R. 32). The motor car had been placed on the setoff in question in the morning, and at noon appellant and the crew were close to the setoff (R. 32). The nearest setoffs in either direction from the one in question were about a half-mile away in either direction (Plaintiff's Exhibit No. 1, R. 7). The motor car was already on the runoff of the setoff in question and this left insufficient room to put the push car on the runoff, and still leave the required seven (7) foot clearance (R. 32, 33, 34).

The judgment of petitioner was that, for a quarter of a mile in either direction, the north side of the roadbed

opposite the setoff in question was the best and safest place to put the push car off the track (R. 34, 39). The filled in part of the setoff between the rails helped in getting the push car off the track (R. 34). The steepness of the bank was the same all along the fill (R. 11).

The push car was moved off the track by the crew and was placed the required seven feet away from the track, down the bank on the north side of the roadbed (R. 33). After eating lunch petitioner and the crew experienced difficulty in getting the push car back up the bank (R. 34).

Under the circumstances at that time and place four men were not a sufficient number to safely lift, drag or pull the car back up the bank (R. 33, 34). There should have been six men to do it safely (R. 34).

Mr. Frizzell was under heavy strain and exertion as the four men (one on each corner of the push car) lifted, tugged and pulled on the work car. The heavy exertion caused his heart to beat faster. The car was pulled up the bank and then it had to be pulled or hoisted up over the ties and rail. The footing at this point was bad, consisting of loose cinder ballast with a water wash or hole or depression near where appellant was standing to lift the car and, "it was an awful embankment there" (R. 34).

As petitioner got the car up over the rail, he slipped, the car dropped two or three inches to the rail, something hit him like a jab with a knife, and he kind of blacked out. Petitioner went down to his right knee, he felt a severe pain hurting in his left arm and chest and did not help finish putting the car back on the track (R. 35, 43). Mr. Frizzell stayed on the job the rest of the day, but did not work right along with his men as he had been doing in the morning (R. 35, 43). Petitioner told one of the crew immediately and another later on that he believed he had hurt himself lifting on the car (R. 35).

On returning to Shenandoah, petitioner was taken to his room in the car of one of the members of the crew. He made out his daily time slips, did not go out to eat, but laid down and went to sleep. He awakened around 9:00 p. m. so full of pain that he could not stand it (R. 36). He then went downstairs where he contacted the company doctor, who told him to go to the hospital (R. 37).

Mr. Frizzell was treated for angina pectoris by his personal physician in Chillicothe, Mo., and was at the Wabash Hospital in Moberly, Missouri, in 1947 (R. 31, 32). Petitioner's physician wrote a letter to whom it may concern (which was made a part of appellant's record at the Wabash Hospital) in which it was stated that due to his condition at that time, he should not do heavy manual labor, but was able to do work of a supervisory nature which did not require too much physical exertion (R. 31). The house surgeon of the hospital at Moberly wrote to Mr. Frizzell's physician, Dr. Gale, at Chillicothe for a copy of an electro-cardiogram, which Dr. Gale had made of Mr. Frizzell on June 27, 1947, and this was sent to the Moberly Hospital. Mr. Frizzell returned to work and August 5, 1947, was promoted to section foreman at Chillicothe (R. 32).

Following his injury petitioner remained in the hospital at Shenandoah for twelve (12) days under the care of the company doctor, after which he was sent home to Chillicothe, Mo., with directions to go to the Wabash Hospital at Moberly, Missouri. He stayed in the Moberly Hospital for seven weeks, and was disqualified for further work with the Wabash Railroad Company on June 30th, 1949 (R. 37, 38; Plaintiff's Exhibit 14).

Mr. Frizzell's physical condition at the time of trial was described as generalized arteriosclerosis, a little ad-

vanced and consistent with his age of forty-six; arteriosclerotic heart disease with a history of angina pectoris; a history of a heart attack which is subsequently consistent with the diagnosis of an anterior wall coronary occlusion with myocardial infarction (R. 47). Petitioner's condition was described as permanently disabling, insofar as he was concerned; and two doctors stated that the petitioner's exertion, slip and fall while working on April 12, 1949, was the precipitating factor of his infarction and coronary occlusion, and his disabled condition at time of trial (R. 48).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In finding no evidentiary basis for a prima facie case of negligence on the part of the respondent requiring submission to the jury.

2. In failing to take into consideration all of petitioner's proof in so holding.

3. In taking into consideration facts and issues not in the record of the case.

4. In failing to evaluate the evidence and inferences therefrom in the light most favorable to the petitioner.

5. In the use of speculation and conjecture outside the record to arrive at its conclusion of respondent's non-negligence.

6. In basing the finding of non-negligence on the part of respondent upon petitioner's contributory negligence and assumption of risk.

REASONS RELIED ON FOR ISS NCE OF WRIT.

I.

The questions presented are substan and are of special importance in view of the conflict of t lecision below with controlling decisions of this Court.

This Court has frequently recogniz he importance of actions arising under the Federal ployers' Liability Act (45 U. S. C. A., Sec. 51, *et seq Wilkerson* v. *Mc-Carthy,* 336 U. S. 53, 69 S. Ct. 413 3 L. Ed. 497. In view of the Wilkerson opinion, and cases cited there-in, we shall not reiterate the general portance of cases arising under the Federal Employer Liability Act but will demonstrate that substantial que ons are presented herein requiring the exercise of this ourt's jurisdiction in this case.

This Court has held that in a cas where the several elements from which negligence migh e inferred are so closely interwoven as to form a sing pattern and each imparts character to the other, the n ligence of the em-ployer may be determined by conduct s a whole. *Blair* v. *Baltimore & Ohio R. Co.,* 323 U. S. 6 89 L. Ed. 490. In this case the court below stated: "V know of no rule of law that would require defendant assume that work-men would not go a half mile to an a ilable empty setoff to take a push car off the tracks der circumstances here shown" (Tr. 10). The Court t n summarized the circumstances upon which it based i conclusion, and in so doing failed to take into conside tion a number of key facts and circumstances, prove by the petitioner, and upon which petitioner strongly relied in charging negligence on the part of the respon ent, with reference to the particular setoff in question:

1. That the work of replacing ties in which petitioner was engaged at the time of his injury required the use of both a motor car and a push car all of the time. That heavy section work required the use of both a motor car and a push car 30% to 40% of the time (R. 32, 39 and 40).

2. That the section crew customarily and ordinarily ate its lunch at a setoff and particularly where, as at the time and place of petitioner's injury, there was no level place close by at which to set the push car off the track because of the steep banks along the fill where the crew was replacing ties (R. 34).

3. That the section crew remove both the motor car and the push car from the track at the same setoff part of the time (Sup. R. 9).

4. That petitioner had been assigned a daily quota of ties to put in and that his supervisor was after him to get in all the ties he could before warm weather (R. 40).

5. That petitioner was assigned to duties requiring him to perform hard physical labor (R. 39, 40), although respondent had notice that petitioner was not able to perform heavy manual labor and was qualified only for supervisory work (R. 31). Although the court took notice of this latter fact (Tr. 7), it was not considered as part of petitioner's case by the court below in arriving at its conclusions (Tr 10, 11, 12).

Under the ruling of the Blair case (*supra*) the Court in this case was under a duty to take all the facts and circumstances of petitioner's case under consideration (as a jury would do in deciding a fact question) in arriving at a conclusion of negligence or non-negligence on the part of respondent. The rule in the Blair case is sound and should be scrupulously followed if the rights of claimants under the Federal Employers' Liability Act are to be preserved. The failure of the decision below to follow the

Blair decision of this Court deprives petitioner of substantial rights and clearly calls for exercise of this Court's jurisdiction.

This Court has held that it is not the function of the Court to search the record for conflicting circumstantial evidence in order to take a case from the jury; that it is the jury, not the court, which is the fact-finding body. That it is the function of the jury to weigh the contradictory evidence and inferences, to judge the credibility of witnesses and to draw the ultimate conclusion as to the facts, under the instructions of the Court. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. It is fundamental that a Court in directing a verdict or testing the propriety of a directed verdict must view the evidence and inferences therefrom most favorably to the party against whom the motion is directed. Vol. 2, Barron & Holtzoff, Federal Practice and Procedure, pages 760, 761 and 762.

In further conflict with the controlling decisions of this Court the opinion below fails to view the evidence together with the inferences therefrom most favorable to this petitioner and in fact gives to the respondent the most favorable interpretation of the evidence. The foregoing statement is readily apparent upon reading the opinion below. The finding of non-negligence on the part of the respondent is primarily based upon the conclusion of the Court that the respondent railroad had no way of knowing that the petitioner would not take his crew one-half mile down the track to another setoff (Tr. 9, 10, 11). In arriving at its conclusion the Court failed to take into consideration the key facts of petitioner's case as outlined above, from which many inferences can be drawn which would support a jury finding of respondent's negligence in this case:

1. In admittedly constructing a seto
question it may be fairly inferred and
respondent knew that its track cars
placed off the track at that place, a
unsafe place at which to perform su
setoff to eliminate the necessity of the
ing the track cars up the steep banks

2. Since the work of replacing ties
the use of two track cars and in view
that heavy section work required the
cars 30% to 40% of the time (R. 32,
respondent knew or should have known
inferred that respondent knew or shou
it would be necessary for its section cr
track cars at the location of the setof
setoff admittedly would accomodate

3. The petitioner's evidence was fu
that track cars were most apt to be pl
a setoff because the roadbed was b
rails which made the operation easie
section crews customarily and ordina
offs particularly where (as along the f
injury occurred) there was no leve
which to set the car off the tracks (
ent's rules required the removal of
tracks while eating lunch (R. 32, 33
crews did not always do so it was th
both track cars from the tracks at
of the time (Sup. R. 9). This evide
inference of knowledge and notice on
ent from which a jury could reaso
gence on the part of the respondent
and maintain a sufficient two car se

4. To further add strength to the i

setoff at the place in
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the section crews lift-
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the use of two track
32, 39), all of which
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(R. 34, 42). Respond-
f track cars from the
33), and although the
their custom to remove
t the same setoff part
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on the part of respond-
onably conclude negli-
t in failing to construct
setoff.

inference of negligence

on the part of the respondent the petitioner at the time of his injury had been assigned a daily quota of ties to install and his supervisor was after him to get in all the ties he could before warm weather (R. 40), which, of course, gives rise to a strong inference that petitioner could not have walked a half mile to another setoff on the day in question because of the productive time thereby lost which would have lowered the number of ties installed and subjected him to criticism from his superior.

5. In view of petitioner's physical condition which precluded him from performing heavy physical labor, of which the respondent had written notice, negligence on the part of the respondent in requiring petitioner to perform heavy physical labor and in failing to furnish him with sufficient help may be logically inferred (R. 31, 39, 40).

The foregoing facts and inferences therefrom, under the controlling decisions of this Court, could have been taken into consideration by a jury, and should have been taken into consideration by the Court below, strongly support petitioner's charges of negligence on the part of respondent. Petitioner submits that the foregoing facts and circumstances ignored in the opinion below conclusively demonstrate that the jury function has been usurped in this case and petitioner deprived of his constitutional right of trial by jury.

Petitioner charged respondent with negligence in the construction and maintenance of the particular setoff at which he was injured (R. 2.). No charge of negligence was made regarding other setoffs or respondent's spacing of setoffs. In keeping with the general erroneous interpretation of the evidence in this case, against rather than for this petitioner, the decision below placed upon petitioner a burden not in the issues, and examined the record for

evidence that the setoffs were spaced too far apart and for evidence that all setoffs should be equipped for two track cars. The ultimate conclusion of the decision demonstrates this error, which in effect gives judgment to respondent for petitioner's failure to prove negligence under a theory which petitioner neither pleaded nor relied upon in any way:

> "Hence, we fail to find any factual basis for a finding that there was negligence in failing to furnish setoffs at half-mile intervals sufficient to accommodate more than one car" (Tr. 10, 11).

This Court has held that the duty of the carrier is a continuing one from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 359, 63 S. Ct. 1062, 87 L. Ed. 1444. The opinion of the court below is contrary to and conflicting with the foregoing principle because of the emphasis placed by the court below upon the fact that the track in question was on a branch line of the respondent railroad where only one or two trains operated during the work day of the section crew (Tr. 5, 6, 10, 12); holding in effect, as a matter of law, respondent's duty was thereby lessened.

This Court has said: "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Central Vermont R. Co.*, and *Blair* v. *Baltimore & Ohio R. Co.* (*supra*). This Court has further held that: "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740. The opinion below cites with approval

many of the decisions of this Court upon which petitioner relied for a jury submission of this cause. Petitioner submits that the record in this case reveals a wealth of evidence upon which reasonable men could reach conclusions of negligence on the part of respondent as well as the conclusion of non-negligence arrived at by the court below.

Petitioner further submits that the questions herein are of particular importance because of the fact that the opinion of the Court of Appeals merely pays lip service to the mandate of this Court requiring submission of F. E. L. A. cases to the jury. That while the decision in this case pays homage to the decisions of this Court the decision actually holds contrary to the letter, spirit and intent of the controlling decisions of this Court. If allowed to stand the opinion below will result in much conflict and confusion as to the meaning of the decisions of this Court cited therein.

It is submitted that the error of the decision of the court below is so patent as to justify its reversal in a *"per curiam"* decision. *Hill* v. *Atlantic Coast Line R. Co.,* 336 U. S. 911, 93 L. Ed. 1075.

II.

The decision below is in conflict with decisions of other courts of appeal involving the same queston.

Petitioner submitted to the Court of Appeals and strongly argued the decision of the United States Court of Appeals for the Second Circuit in *Stewart* v. *Baltimore & Ohio R. Co.,* 137 F. 2d 527. In the Stewart case the plaintiff suffered a coronary thrombosis resulting from a strain while attempting to throw a new and hard to work switch in the defendant's railroad yard; in much the same manner as this petitioner sustained his heart attack

through overexertion caused by an unsafe and insufficient setoff. In the Stewart case the court held (l. c. 528):

> "In our opinion it was for the jury to say whether operation of the switch in question was so likely to result in injury from overexertion that a prudent employer would not have supplied it to his workmen, but would rather have furnished a more easily turned appliance * * *.
>
> Doubtless an employee cannot recover damages for every harm he may suffer through failure of his employer to provide him with the best sort of appliance unless the situation is such that the chance of injury can be reasonably foreseen. But where, as here, a likelihood of injury from the operation of a switch that was hard to turn cannot be said to have been beyond a reasonable apprehension the question whether the employer maintained a proper standard of care was for the jury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 83 L. Ed. Overexertion resulting in serious casualties is something which can as well be foreseen as many other occurrences and is something which an employer may be thought bound to take all reasonable steps to prevent.
>
> It follows from the foregoing that plaintiff made a good *prima facie* case which should have been submitted to the jury * * *."

The decision of the court below is also directly in conflict with the case of *Robak* v. *Penn R. Co.* (3rd Cir.), 178 F. 2d 485, where it was held that the jury could take into consideration as a ground of negligence on the part of the defendant railroad, the assignment of too strenuous work duties in the light of its knowledge of plaintiff's pre-existing physical disability.

The decision below is further in conflict with the opinion of the United States Court of Appeals for the First

Circuit in *Boston & M. R. R.* v. *Kyle,* 156 F. 2d 112, where the court held (l. c. 112):

> "In affirming the judgment below it will suffice to say that there is ample testimony in the record to indicate, first, that although the plaintiff was experienced in the kind of work he was doing when he was hurt, he was at that time working under the direction and subject to the orders of his fellow machinist, and, second, that although the latter directed that their work be done in the usual or customary way, there was a safer way in which it could have been done which was sometimes adopted in the defendant's shop, and that, if this safer method of procedure had been followed, the injury which befell the plaintiff would not have occurred. Clearly this evidence is enough to take the issue of the defendant's causal negligence to the jury."

In the interest of uniformity among the several Courts of Appeal this Court should assume jurisdiction of the cause herein (Rule 38 (5), U. S. S. Ct.).

III.

The decision below is in conflict with Sections 53 and 54, Title 45, U. S. C. A.

Sections 53 and 54, U. S. C. A. 45, removed as defenses under the Federal Employers' Liability Act the defenses of contributory negligence and assumption of risk. The decision of the Court of Appeals in this case admittedly turns upon the fact that the petitioner saw the danger of removing the work car from the track at the place in question and either assumed the risk of so doing, or was contributorily negligent in failing to walk the crew and the work car a half mile to another setoff. The Court of

Appeals recognized that its decision was trespassing upon forbidden ground when it said:

> "And to take that fact into consideration in determining the existence of any derelictions or negligence on defendant's part is not to say that plaintiff may not recover because of his own contributory negligence, when of course he can, but is merely to take such fact into consideration in determining whether there was any reasonable basis for concluding that defendant should have expected plaintiff to select that location for removing the push car" (Tr. 5).

This Court has held: "No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge be submitted to the jury for their determination." *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 67, 63 S. Ct. 45. Regardless of how phrased or how rationalized, petitioner's failure to walk a half mile to another setoff and petitioner's removing the work car from the track at a dangerous place can only be contributory negligence or assumption of the risk or both, neither of which bars his recovery. As pointed out above this conclusion of the court is primarily the drawing of an unfavorable inference in favor of the respondent from the undisputed evidence in the case; and is doubly erroneous because the inference is based upon the contributory negligence or assumption of risk of the petitioner and therefore is in direct conflict with plain letter of the F. E. L. A., in addition to the controlling decisions of this Court cited above.

If railroad negligence must be predicated upon the forseeability of contributory negligence, as a matter of law, contributory negligence becomes reinstated as a complete defense in F. E. L. A. cases. In effect, a judicial repeal of Secs. 53 and 54, Title 45, U. S. C. A.

Conclusion.

For the foregoing reasons we respectfully submit that this petition for certiorari should be granted.

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 514.

JEWELL FRIZZELL, *Petitioner*,

vs.

WABASH RAILROAD COMPANY, a Corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Court of Appeals (Tr. 4-13) is reported at 199 F. 2d 153 (Advance Sheet dated December 1, 1952). The proceedings in the District Court were not officially reported.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A., Sec. 1254 (1). The judgment of the Court of Appeals was entered October 15, 1952 (Tr. 13-14). Petition for rehearing (Tr. 15-26) was denied on November 5, 1952 (Tr. 27).

The jurisdiction of the District Court was founded upon an action arising under the laws of the United States (Title 45, U. S. C. A., Sec. 51 *et seq.*) under Title 28, U. S. C. A., Sec. 1331. The jurisdiction of the Court of Appeals was invoked under Title 28, U. S. C. A., Sec. 1291.

QUESTIONS PRESENTED.

1. Whether all of the facts and circumstances of petitioner's case made a *prima facie* showing of negligence under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*), requiring submission of the question of respondent's negligence to the jury?

2. Whether the decision of the Court of Appeals erroneously invoked the defenses of contributory negligence and assumption of risk, depriving petitioner of his immunity from said defenses as provided by Sections 3 and 4 of the Federal Employers' Liability Act (45 U. S. C. A., Secs. 53 and 54)?

STATEMENT

Petitioner's Statement of Facts is substantially correct as far as it goes, but it omits material facts and fails to give the complete factual situation which was the basis of the decision of the Court of Appeals.

Respondent submits that the statement of facts at the beginning of the opinion of the Court of Appeals is more nearly fair, complete and unbiased, while at the same time stating the facts in the light most favorable to petitioner. Respondent therefore adopts the statement of facts from the opinion of the Court of Appeals (Tr. 4-7).

ARGUMENT OPPOSING ISSUANCE OF WRIT.

I.

Certiorari Should Be Denied. Petitioner Has Failed to Show That the Questions Presented Are of Special Importance or Involve Public Interest and Has Failed to Show a Conflict with Decisions of This Court.

The issuance of the writ of certiorari by this Court is highly discretionary. This is as it should be, for if Congress had not so provided, the Court would be paralyzed by its submergence in thousands of appeals.

As the Court said in its opinion in *Magnum Import Company* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, l. c. 924:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes; first to secure uniformity of decision between those courts in the nine circuits; and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

Petitioner in his reasons relied on for the issuance of the writ other than the bare fact that the case arises under the Federal Employers' Liability Act, relies entirely

on an alleged conflict of the opinion below with opinions of this Court, opinions of the various courts of appeal, and the provisions of the Federal Employers' Liability Act.

Petitioner alleges that the opinion in the court below conflicts with the opinion of this Court in *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 89 L. Ed. 490. In that case the plaintiff was ordered, over his objections, to use a light truck of insufficient capacity to unload certain heavy steel tubes. He used the light truck and was injured as a result. In the case at bar there was no comparable question, since petitioner was himself free to order the push car's removal at any place he chose. Respondent cannot be convicted of negligence if petitioner, under no compulsion, selected a place where the embankment was steep.

In the other case with which a conflict is alleged, namely, *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, the plaintiff, an inexperienced employee, was ordered to unload a hopper car by standing in an insecure place and using a wrench to turn a shaft which was out of order. Plaintiff was injured when the shaft suddenly turned and he was thrown from his place of work. In the case at bar, the evidence showed there were many suitable places to remove the push car, but petitioner himself selected the particular place where it was done, and no one ordered him to do so. Furthermore, there was no defective or deceptive condition even at that place, as there was in the *Bailey* case. Thus, both of the cases which petitioner relies on are clearly distinguishable from the case at bar, and the opinion of the Court of Appeals does not conflict with either.

Petitioner lists five surrounding facts or circumstances from which he alleges negligence may be inferred, and which he claims were overlooked by the Court of Appeals

in its consideration of the case. All of these were, in fact, considered and dealt with by the Court of Appeals in its well-reasoned opinion (Tr. 4-13).

II.

The Decision Below Is Not in Conflict with Decisions of Other Courts of Appeal Involving the Same Question.

Petitioner alleges that the opinion below conflicts with three opinions of other courts of appeal. In the first of these, *Stewart* v. *Baltimore & Ohio R. Co.*, (2d Cir.) 137 F. 2d 527, the plaintiff suffered a heart attack as a result of attempting to operate a switch which was stiff and worked hard. It was held to be a jury question as to whether the railroad was negligent in furnishing such a switch, which plaintiff was *required* to use. In the case at bar, petitioner was not *required* to remove the push car at any particular point, and it was up to him to determine whether he would help handle the push car or let the members of his section crew do it (R. 42). There had never been more men in his crew than on the day of the accident (Sup. R. 7), and there were places where two men could remove the push car (Sup. R. 5).

In *Robak* v. *Penn. R. Co.*, (2d Cir.) 178 F. 2d 485, the plaintiff, a woman, was employed in the defendant railroad's upholstery shop. Defendant, although it knew she had a weak back, *ordered* her to do heavy work, resulting in her injury. In the case at bar, petitioner was not *ordered* to do anything. He was the foreman and made his own decision.

In *Boston and Maine R. Co.* v. *Kyle*, 156 F. 2d 112, plaintiff was handling a heavy engine part, and in doing so was injured. Plaintiff's foreman had *ordered* him to use

a certain method of work, when there was a safer method sometimes used in the shop. If this method had been used the plaintiff would not have been injured. These facts are in nowise analogous to those here involved.

Respondent submits that the opinion in the court below does not conflict with any of the foregoing cases, and no justification for a writ of certiorari has been shown by petitioner.

III.

The Decision Below Is Not in Conflict with Sections 53 and 54, Title 45, U. S. C. A.

Petitioner, on page 20 of his petition, and under point III, attacks the Court of Appeals' opinion as a recognition of the now-abolished defenses of "contributory negligence" and "assumption of risk." He quotes, *out of context,* a sentence from the Court's opinion (Tr. 9, which is erroneously cited as Tr. 5 by petitioner) in support of his contention. When read *in context,* the quoted sentence has an entirely different meaning than petitioner contends. The opinion cites *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 67 S. Ct. 598, and *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413, as authority for the proposition that respondent would not necessarily be absolved from negligence by reason of the fact that petitioner chose a hazardous place to remove the push car, but would still be negligent if respondent should have anticipated that petitioner might reasonably be expected to choose the hazardous location, because petitioner's contributory negligence is no defense. The Court then went on to point out that since, in this case, unlike the *Ellis* case, the hazard was so obvious as to preclude its being reasonably expected by respondent that petitioner might choose it, there was no basis for a finding of negligence by respondent. It was in this connection that the

court below used the sentence quoted out of context (Tr. 9), and its meaning is not at all subject to the twisted interpretation urged by petitioner. The reference in the quoted language was to the foreseeability by respondent of petitioner's careless act, and not to "contributory" negligence.

The Court of Appeals expressly recognized that neither "contributory negligence" nor "assumption of risk" are bars to recovery under the Act (Tr. 9 and 10), but it also recognized that there could be no submissible case unless there was *some* evidence of negligence by respondent.

Respondent submits that the opinion of the court below is entirely in harmony with the Act, and shows that the court considered every circumstance which might tend in law to place a duty on the respondent. After considering the petitioner's evidence, and all of the permissible inferences which could be drawn therefrom in his favor, the court below arrived at the inescapable decision that fair-minded men could not differ on the issue of what "a reasonable and prudent man would have done under the circumstances of the situation." See *Anderson* v. *Atchison, Topeka & Santa Fe R. Co.*, 333 U. S. 821, 92 L. Ed. 1108. To have concluded otherwise would have been to impose on respondent and all railroads the duty of abolishing embankments along railroad rights of way, and thereby provide continuous level surfaces for the use of section foremen who might not use sound judgment in selecting a place to remove a push car from the track.

CONCLUSION.

Respondent submits that, in keeping with the practice of this Court, this case does not merit a review by certiorari.

The reasons for this practice were indicated by Chief Justice Taft for a unanimous Court in *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393, 67 L. Ed. 712, 714.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

Petitioner has failed to show that the decision in the court below conflicts either with decisions in this Court or in the various courts of appeal.

Respondent respectfully urges, therefore, that the petition for certiorari be denied.

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